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No. 827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

UNITED STATES FIDELITY & GUARANTY CO.,
Petitioner,

vs.

NANCY WINKLER, a Minor by her Mother and Guardian Ad Litem VIOLET M. WINKLER, JOYCE ANN SIMPSON and MARGARET LOUISE PATTON LOHSE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION

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INDEX

Questions Presented 1

Statement 2

Argument—

There Is No Conflict with the Decisions of the State Courts 6

Conclusion 11

Table of Cases

Appalachian Power Company v. *American Institute of Certified Public Accountants*, 80 S.Ct. 16, 4 L.Ed. 30 10

Hall v. *Weston*, Mo.Sup., 323 S.W.2d 673, l.c. 679 .....7, 8, 10

Haynes v. *Linder*, Mo.App., 323 S.W.2d 505 .....6, 7, 8

Nye v. *James*, Mo.App., 373 S.W.2d 655 ..... 6, 9

Ohio Farmers Insurance Company v. *Lantz*, 7th Cir., 246 F.2d 182, l.c. 185 .....8, 10

Sabella v. *American Indemnity Company*, 372 S.W.2d 36, l.c. 40 8

Western Casualty and Surety Company v. *Herman*, 318 F.2d 50 .....8, 10

Wolf v. *Weinstein*, 372 U.S. 633, 83 S.Ct. 969, 10 L.Ed. 33 10

Texts

5A Am. Jur., Automobile Insurance, §95, page 94 7

45 C.J.S., Insurance, §829c (2) bb, p. 900 7

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED

The Petitioner has not properly or adequately stated the Questions presented. The Questions now before this court are simply:

1. Whether the decisions of the Courts below holding that the plaintiff by its policy provisions and actions intended that both Mr. and Mrs. Patton be named insureds, are in conflict with applicable Missouri law.

2. Whether the decisions of the Courts below holding that Mrs. Patton Lohse was driving the insured automobile with the permission of Mr. Patton, the named insured, under the provisions of Clause (a) (2) of Part I of said policy (Plaintiff's Ex. 1; R. 179), are in conflict with applicable Missouri law.

STATEMENT

The Respondents are dissatisfied with the Petitioner's statement of the case in that it omits much of the vital testimony of key witnesses, and states the evidence in the light most favorable to Petitioner. The Respondents, therefore, add the following facts from the record to cure the deficiencies of Petitioner's statement.

Respondents, Nancy Winkler and Joyce Ann Simpson, obtained $15,000 and $10,000 judgments respectively in the Circuit Court of Jackson County, Missouri, against Margaret Louise Patton Lohse. Both judgments arose out of an automobile accident which occurred on October 23, 1959 (R. 194-196). Margaret Louise Patton Lohse was the operator of a 1955 Buick which collided with the automobile driven by Joyce Ann Simpson and in which Nancy Winkler was a passenger (R. 189-192). Margaret Louise Patton Lohse claimed to be an insured entitled to the benefits of an automobile liability insurance policy issued by the Petitioner, United States Fidelity & Guaranty Company, on the 1955 Buick driven by Mrs. Patton Lohse at the time of the accident (R. 9-10). Nancy Winkler and Joyce Ann

Simpson likewise claimed coverage existed under said policy for Mrs. Patton Lohse's use of the 1955 Buick (R. 7-8).

The 1955 Buick involved herein was purchased new by the Pattons with jointly held funds (R. 19). The Pattons traded in a 1953 Ford on the 1955 Buick and the Ford was also jointly owned, although the actual legal certificate of title was in Mr. Patton's name (R. 20). This was also true as to the 1955 Buick (R. 20). Mrs. Patton drove the 1955 Buick about 90% of the time and used it going back and forth to work as her husband owned and used both a panel and pick-up truck (R. 20). Mrs. Patton made the payments on the 1955 Buick (R. 20).

Mrs. Patton formerly worked for plaintiff, U.S.F.&G., in 1948 or 1949, after her marriage to Mr. Patton (R. 20). She knew plaintiff's agent, Roger Durkee, who was an agent of the company during that period (R. 20-21).

Margaret Patton made the insurance arrangements initially with Mr. Durkee and put him in touch with Mr. Patton (R. 21). The Pattons desired complete insurance coverage as long as either one of them drove the 1955 Buick and Durkee asked if both would be driving the vehicle and they said they would (R. 21). The Pattons also advised Mr. Durkee that it was a jointly owned car (R. 22). Mrs. Patton thought her name was on the insurance policy as a named insured, since agent Durkee asked if both were going to drive the car (R. 22). She found out for the first time after the accident she was not listed on the policy as a named insured (R. 22).

Identification cards were sent out by agent Durkee with information concerning insurance coverage and one was sent to Mrs. Patton (R. 22).

In February of 1959, Mrs. Patton took the Buick and drove it during the marital separation with Mr. Patton's understanding, consent and knowledge (R. 22). Mr. Patton's license plates were still on the car at the time of the accident (R. 22). He apparently still had a set of keys to the car, as he did not give Mrs. Patton the extra set (R. 27).

The chief underwriter for the Petitioner, Frederick R. Chapman, testified by deposition that the wife would be listed as a named insured in the insurance policy if it were requested by the agent or the insured without any increase in premium (R. 65). In this instance, if agent Durkee had requested that both Mr. and Mrs. Patton be listed as named insured, it would have been done, and the policy would have been renewed each year in their joint names (R. 65). Mr. Chapman admitted that if both Mr. and Mrs. Patton had been named in the insurance policy as named insureds and then divorced, and the accident occurred, there would be coverage for this accident (R. 66, 67, 68).

Mrs. Bailey, an underwriter employed by the plaintiff for 20 years, testified that she knew of the separation of the Pattons in 1959, and the company had been notified of Mr. Patton's change of address during the separation (R. 110, 116). Mrs. Bailey acknowledged that the company would have reissued the insurance policy in this case in 1959 without any increase in premium, putting both Mr. and Mrs. Patton's name on the policy as named insured, if so requested by agent Durkee (R. 118). The premium would have been the same whether or not the policy was issued in one or both names (R. 119).

Mr. Durkee testified that he knew that the Pattons were living separately in 1959 (R. 145). He acknowledged

that the Pattons did not ask for a particular type of policy and that they stated they wanted full liability coverage for both Mr. and Mrs. Patton on the 1955 Buick (R. 146, 148). The decision as to how to make out the policy was left up to Durkee (R. 148). Mr. Durkee knew that Margaret Patton drove the 1955 Buick most of the time and also knew that the Pattons were separated (R. 147).

Mr. Durkee knew that Mrs. Patton was using the Buick during the separation but no different coverage was placed by him because of this fact (R. 149). He gave this information to the Petitioner and there was no indication from the Petitioner that any change should be made in the policy (R. 149). As far as he could recall, both Pattons received identification cards from the Petitioner for the 1955 Buick (R. 149).

The Claim Superintendent for the Petitioner, Mr. Dinwiddie, when advised of the accident by Mr. Durkee, said that he thought there might be permissive use and agent Durkee told Mrs. Patton of this conversation (R. 151). Agent Durkee told Mrs. Patton that she was covered and didn't have anything to worry about and that he, Durkee, thought she was out of the woods (R. 151). The statements to Mrs. Patton by Durkee were based upon statements made to him by the Claim Superintendent, Mr. Dinwiddie (R. 151).

Agent Durkee testified that had he understood that in order to provide full coverage for both the Pattons as long as either one of them had the car, they both should have been listed as named insured, he would have had the policy issued that way (R. 152). Agent Durkee testified (R. 154-155) that, knowing the Pattons were separated and knowing they both wanted full coverage on the Buick as long as either of them was driving it, had he known

Petitioner would deny coverage under the circumstances of this case, he would have seen to it that both of the Pattons were put on the policy as named insured.

The District Court, on September 14, 1964, rendered its memorandum opinion, Findings of Fact and Conclusions of Law, holding that coverage existed in this case (R. 158-170). The Findings of Fact are found in the record at 167-169, the Conclusions of Law at 169-170, and the Judgment Entry at 170-171.

On appeal to the Eighth Circuit Court of Appeals the judgment of the District Court was affirmed on October 27, 1965, and Petitioner's Petition for Rehearing, filed November 10, 1965, was denied on November 15, 1965.

ARGUMENT

There Is No Conflict with the Decisions of the State Courts

The petitioner claims that the decisions of the Courts below are in conflict with *Haynes* v. *Linder,* Mo. App., 323 S.W.2d 505 and *Nye* v. *James,* Mo.App., 373 S.W.2d 655, and that therefore this court should grant its writ of certiorari to review the decisions of the Courts below. The decisions of the Courts below are not only not in conflict with the *Haynes* and *Nye* cases, they are amply supported by decisions of the Missouri Supreme Court and decisions of Circuit Court of Appeals, expressly approved by the Missouri Supreme Court in other opinions. It is noted that both the *Haynes* and *Nye* cases come from Courts of Appeal of Missouri rather than the Missouri Supreme Court.

The *Haynes* case relied on by the petitioner, while involving coverage under an omnibus clause, is in no other

way in point. As the petitioner points out (Pet. 9, 12), it involved a purported sale of the vehicle between strangers, rather than a transfer of the mere indicia of ownership between a husband and wife pursuant to a divorce decree as is true in the case at bar. The only reference to *ownership* in the excerpt of the *Haynes* opinion relied on and contained in petitioner's petition (page 9) is the statement:

> "As a general rule, this means the insured purporting to give consent must own the insured vehicle, . . ."

This statement is based on reference to 5A Am.Jur., Automobile Insurance, §95, page 94, and 45 C.J.S., Insurance, §829c (2) bb, p. 900, which is also quoted from by the petitioner on page 11 of its petition. This may be a general rule, but it is not by any decision cited by the petitioner the exclusive rule in Missouri. In fact, the very citation referred to by petitioner (Pet. 11) from 45 C.J.S., Insurance, indicates that:

> "permission or consent within an omnibus or extended coverage clause cannot be given by one who is not the owner of the car, . . . *or by one who is not a named insured,* even though he is the owner or has obtained exclusive control and dominion over the car, as by purchase." (Emphasis added).

This is not to say, as petitioner claims, that one that is a named insured cannot give permission within the terms of the omnibus or extended coverage clause, even though he does not own the car.

The Missouri Supreme Court in *Hall* v. *Weston,* Mo. Sup., 323 S.W.2d 673, l.c. 679 (R. 164), cited by the trial court, held that where a policy of automobile liability insurance insures only against liability for damages by reason of bodily injury and property damage arising out of

the ownership, maintenance, or use of the automobile, ownership under those circumstances is *irrelevant* on the question of coverage liability. In the *Hall* decision, the Missouri Supreme Court relied on and cited with approval, as it has done at least one other time since, the case of *Ohio Farmers Insurance Company* v. *Lantz,* 7th Cir., 246 F.2d 182, l.c. 185, where the title to an automobile had been transferred from the transferor, who was the named insured, to his son. In the *Lantz* case (a decision the petitioner continues to ignore, even though cited in both opinions below), the court held that the permission given prior to this transfer by the father to the son would continue to operate as permission of the named insured after the ownership had been transferred to the son and so he would be covered as a permissive user, stating that ownership of the automobile either by the father or the son is irrelevant on the question of liability risks assumed in the policy. The *Lantz* case has since been cited with approval by the Missouri Supreme Court en Banc in *Sabella* v. *American Indemnity Company,* 372 S.W.2d 36, l.c. 40. In addition, the very case that the petitioner relies on, *Haynes* v. *Linder,* cites the *Lantz* decision with approval, 323 S.W.2d, l.c. 512.

A case applying Missouri law and decided by the Eighth Circuit Court of Appeals in 1963, *Western Casualty and Surety Company* v. *Herman,* 318 F.2d 50, was relied on by the Trial Court and the Court of Appeals in this case and strongly supports the decisions of both. *Herman* holds that the owner of a vehicle, not listed as a named insured, could operate it with permission of the named insured within the meaning of the omnibus clause. The *Herman* decision, making a determination of Missouri law, was based upon both *Hall* and *Lantz.* As with *Lantz,* the

Petitioner fails again to mention or consider this very important decision.

The Petitioner next cites *Nye* v. *James*, Mo.App., 373 S.W.2d 655, in support of its position that the decisions of the Court below are in conflict with the law of Missouri on permissive use. This case is clearly not in point. The driver of the automobile listed in the policy in the *Nye* case did not have permission to drive from either of the owners of the vehicle, much less the named insured listed in the policy of liability insurance upon which coverage was claimed. There was no issue presented or decided in *Nye* which would indicate that in Missouri it is essential to coverage under an automobile liability policy that the named insured either own the automobile or have an insurable interest therein to be able to grant his consent or permission under the omnibus clause. The *Nye* opinion does not mention any of the Missouri cases on the issue of insurable interest. That question was just not before the court. The *Nye* opinion merely holds in accord with the general rule that one to whom the insured has given permission to use the automobile has no authority to delegate or grant such permission to another so as to make the latter an additional insured. Thus the case does not even purport to decide whether a named insured can grant permission to drive the insured automobile if he does not hold title to it.

The petitioner, while stating (Pet. 5) that the Courts below erred in holding that the plaintiff by its policy provisions and actions intended that both Mr. and Mrs. Patton be named insureds, cited no authority or even discussed this issue. It must be assumed, therefore, that the Court below were in fact correct in stating that there are no Missouri cases setting forth the law on these pre-

cise facts that would conflict with their holding on this point and that therefore the Court was correctly left to its judgment as to what the Missouri Supreme Court would hold in this situation (R. 164; Pet. A1, A8).

Indeed, the petitioner seems ultimately to concede all of the points upon which the Court held in favor of the respondents except the question of permissive use, as this was the only point developed and argued in the petitioner's entire *Reasons for Granting the Writ.*

It is significant to note that the petitioner makes no claim that this decision is of great public concern or importance in asking this court to grant the writ. Ordinarily, this court on certiorari accepts the determination of state law as found by a Court of Appeals in diversity actions, particularly when the same finding is made by the Federal District Court, *Appalachian Power Company* v. *American Institute of Certified Public Accountants,* 80 S.Ct. 16, 4 L.Ed. 30.

Certiorari is ordinarily not granted where the controversy primarily involves questions of state law and presents no federal questions of substance, *Wolf* v. *Weinstein,* 372 U.S. 633, 83 S.Ct. 969, 10 L.Ed. 33. The petitioner in this case has neither stated nor hinted at any federal question of importance in the case at bar. The issues raised by the petitioner were all decided against it in *Hall, Lantz,* and *Herman, supra.* There is no conflict between the decisions of the Courts below and the cases cited by the petitioner in his petition, or with Missouri Law.

CONCLUSION

For the reasons above set forth, respondents respectfully request this court to deny the Certiorari.

Respectfully submitted,

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